

D.A., a minor, et al. v. Tri County Area Schools, et al.

**Exhibit B to Pls.’
Response in Opp. to Defs.’
Motion to Extend Dates in
Scheduling Order**



Conor Fitzpatrick <conor.fitzpatrick@thefire.org>

Re: D.A. v. Tri County Area Schools - Recap of Today's Call

1 message

Conor Fitzpatrick <conor.fitzpatrick@thefire.org>

Wed, Nov 29, 2023 at 12:14 PM

To: Annabel Shea <ashea@gmhlaw.com>

Cc: Bunny Binno <ebinno@gmhlaw.com>, Maia Walker <maia.walker@thefire.org>, "Ken B. Chapie"

<kchapie@gmhlaw.com>, Kelley Bregenzer <kelley.bregenzer@thefire.org>

Hi Annabel,

I hope you and yours had a pleasant Thanksgiving. We appreciate the supplemental production of documents. With respect to Request #6, which it looks like the bulk of produced documents are responsive to, I'm happy to work with y'all if there are types of documents taking up time and energy which are of unlikely relevance to the case. Just let me know.

It is inaccurate to say we opposed an extension. Indeed, on November 20th, we *proposed* an extension in part to provide Defendants additional time to produce documents in response to our August requests. Defendants did not take us up on our offer and instead requested a blanket 60-day extension to all dates. We explained that given the time-sensitive nature of the political speech at issue in this case, we could not consent to such a long extension. That remains our position. If Defendants file a motion for a 60-day extension, we will oppose it. If Defendants are set on a lengthy extension, we suggest the parties jointly request a telephonic status conference with Judge Maloney or the Magistrate Judge to discuss these issues, seek guidance, and ideally avoid the need for time-consuming motion practice.

Finally, and I hate to be a broken record here: after an initial review of Defendants' supplemental production, I reiterate my belief that the parties ought to be able to work together and generate a set of stipulated facts. It does not seem productive for the parties to spend this amount of time and energy on discovery when there doesn't appear to be an underlying dispute about what happened (i.e. that the boys wore the sweatshirts, didn't cause a disruption, complied when asked to remove the sweatshirts, and there hadn't been prior issues with "Let's Go Brandon" or other political apparel causing disruption).

All the best,
Conor

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On Wed, Nov 29, 2023 at 10:33AM Annabel Shea <ashea@gmhlaw.com> wrote:

Conor,

As you are aware we sent supplemental responses to discovery yesterday. I am attaching a second supplemental response to this email producing the documents your requested by way of clarification for RFP No. 2.

We are still working on compiling the documents responsive to RFP No. 6, which turned out to be more voluminous than expected. We will get those to you as soon as possible and in advance of the December 21st settlement conference.

I would like to request one more time that we agree to a stipulation to extend dates. The initial scheduling order on this case was filed in August and this would be our first request to extend the dates in the scheduling order. If you do not concur then we will note your non concurrence and will be filing a motion.

Best,

Annabel

From: Conor Fitzpatrick <conor.fitzpatrick@thefire.org>

Sent: Monday, November 20, 2023 2:11 PM

To: Annabel Shea <ashea@gmhlaw.com>

Cc: Bunny Binno <ebinno@gmhlaw.com>; Maia Walker <maia.walker@thefire.org>; Ken B. Chapie <kchapie@gmhlaw.com>; Kelley Bregenzer <kelley.bregenzer@thefire.org>

Subject: Re: D.A. v. Tri County Area Schools - Recap of Today's Call

Hi Annabel,

Unfortunately, we must object to a 60-day extension. We served our discovery requests over three months ago, and my proposed extension would have resulted in Defendants having nearly four full months to collect and review documents. Given that this should not be a document-heavy case, anyhow, we cannot consent to a 60-day punt.

A prompt production of documents is also necessary for the December 21st settlement conference so that Plaintiffs can meaningfully evaluate Defendants' justification for prohibiting Plaintiffs' political speech.

I'll reiterate the suggestion I made to John over the summer: unless there's something that hasn't been relayed to us or the family, it doesn't sound like Defendants dispute the material facts regarding the Plaintiffs (i.e. that the boys wore the sweatshirts, didn't cause a disruption, and complied when asked to remove the sweatshirts). If that's the case, we ought to be able to stipulate to the "what happened." If, as I suspect (and told John), this case just comes down to whether "Let's Go Brandon" is proscribable under *Bethel*, there's no reason to burn everyone's time and money with discovery about *Tinker*-style disruption.

While we fully appreciate Defendants have other cases (as do we), we cannot consent to this case being placed on the back burner due to the resulting delay in securing a ruling regarding the First Amendment issues. That is particularly true here, where the students wish to engage in core political speech regarding the current President who of course is up for re-election in less than a year.

We are amenable to perhaps a very slight adjustment to the extension I proposed (a week here or there, and not on the core dispositive or trial dates), but no more. If Defendants do not agree, we'll proceed under the current Scheduling Order and reserve all rights.

Finally, I've cc'd my colleague Kelley Bregenzer here, who is replacing Adam Tragone on the case.

All the best,

Conor

Conor T. Fitzpatrick

Senior Attorney

Foundation for Individual Rights and Expression (FIRE)

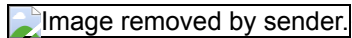
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On Mon, Nov 20, 2023 at 10:21 AM Annabel Shea <ashea@gmhlaw.com> wrote:

Conor,

It looks like your proposal only extends dates by 14 days. Would you be agreeable to extending all dates 60 days? We have a really busy next few months. We are also going to want to take the depositions of the two kids and their parents.

Please let me know your thoughts.

Best,

Annabel

From: Conor Fitzpatrick <conor.fitzpatrick@thefire.org>

Sent: Monday, November 20, 2023 8:00 AM

To: Annabel Shea <ashea@gmhlaw.com>

Cc: Adam Tragone <adam.tragone@thefire.org>; Bunny Binno <ebinno@gmhlaw.com>; Maia Walker <maia.walker@thefire.org>; Ken B. Chapie <kchapie@gmhlaw.com>

Subject: Re: D.A. v. Tri County Area Schools - Recap of Today's Call

Hi Annabel,

How does the following schedule look (revised dates in bold)? We of course reserve the right to revisit depending on the contents of the discovery production.

Due date for Defendants' discovery Production - Nov 29, 2023

Disclosure of Expert reports - **Dec. 8, 2023**

Disclosure of rebuttal experts - **Dec 20, 2023**

Early Settlement Conf. - Dec. 21, 2023

Rebuttal reports due - **Jan 5, 2024**

Completion of Discovery - **Jan 26, 2024**

Dispositive Motions - **Feb 25, 2024**

Settlement Conference - Aug 23, 2024

Final Pretrial Conference - Sept 30, 2024

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On Wed, Nov 15, 2023 at 6:24 PM Annabel Shea <ashea@gmhlaw.com> wrote:

Conor, we are currently working with the school district and hope to get you the documents next week, or at the latest the following week due to the holiday. We are happy to stipulate to an adjournment of dates in the scheduling order.

Best,

Annabel

Sent from my iPhone

On Nov 15, 2023, at 11:47 AM, Conor Fitzpatrick <conor.fitzpatrick@thefire.org> wrote:

Hi Annabel and Ken,

When can we expect a document production? The expert report deadline is this coming Monday, and it likely doesn't make sense for experts to finalize reports and then go through the hassle of doing revised reports after a document production. If you can let me know when you anticipate producing documents, perhaps we can agree upon an amendment to the current scheduling order.

All the best,

Conor

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On Wed, Nov 8, 2023 at 3:34 PM Annabel Shea <ashea@gmhlaw.com> wrote:

We are actually in the process of filing a monster MSJ on another case and would greatly appreciate if your office could file if you would like it submitted to the court today. Otherwise we are happy to take care of it tomorrow morning. Please let me know your preference.

Sent from my iPhone

On Nov 8, 2023, at 3:32 PM, Conor Fitzpatrick <conor.fitzpatrick@thefire.org> wrote:

Hi Annabel,

Great, and that makes sense. You have our consent to add my /s/ and file. If y'all are tied up, please let me know and we can file.

All the best,

Conor

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On Wed, Nov 8, 2023 at 3:24 PM Annabel Shea <ashea@gmhlaw.com> wrote:

Conor,

We are fine with deleting paragraph 7 based on the circumstances of this case. Typically, it is included in cases where we have video containing student's images which is not an issue in this case. Please see attached.

And whether a motion to file under seal is necessary generally depends on the factual record and whether the documents relied on can be understood with redactions. It could be necessary at the MSJ stage, and we are not opposed to discussing that option once we get father down the road with discovery.

Best,

Annabel

From: Conor Fitzpatrick <conor.fitzpatrick@thefire.org>

Sent: Monday, November 6, 2023 3:20 PM

To: Annabel Shea <ashea@gmhlaw.com>
Cc: Adam Tragone <adam.tragone@thefire.org>; Bunny Binno <ebinno@gmhlaw.com>; Maia Walker <maia.walker@thefire.org>; Ken B. Chapie <kchapie@gmhlaw.com>
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Hi Annabel,

Thanks to y'all for putting this together and sending it over. Largely looks good. Two questions. (1) Is paragraph 7 necessary? I'd hate to agree to this only to be told that we'll have to fly to Michigan to review FERPA docs in person. (2) Is the thinking that once SJ time rolls around we'd do a separate (perhaps) joint motion to file under seal?

All the best,

Conor

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On Fri, Nov 3, 2023 at 6:44 PM Annabel Shea <ashea@gmhlaw.com> wrote:

Conor,

Please see a draft protective order attached to this email containing language protecting student education records under FERPA. Please let me know if you have any questions. If you agree with the form, and if we have your permission, then we can submit it to the court.

From: Conor Fitzpatrick <conor.fitzpatrick@thefire.org>

Sent: Tuesday, October 31, 2023 3:53 PM

To: Ken B. Chapie <kchapie@gmhlaw.com>; Annabel Shea <ashea@gmhlaw.com>
Cc: Adam Tragone <adam.tragone@thefire.org>; Bunny Binno <ebinno@gmhlaw.com>; Maia Walker <maia.walker@thefire.org>
Subject: Re: D.A. v. Tri County Area Schools - Recap of Today's Call

Hi Ken and Annabel,

Just poking my head in to check on the status of the FERPA protective order language you were going to send our way.

All the best,

Conor

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On Thu, Oct 26, 2023 at 5:12 PM Conor Fitzpatrick <conor.fitzpatrick@thefire.org> wrote:

Hi Ken and Annabel,

Thanks for taking the time to meet with me and Adam today regarding Defendants' discovery responses. To briefly memorialize our discussion:

With respect to the requests to which Defendants lodged FERPA objections: we agreed to work towards a stipulated protective order. We invited you, and you agreed, to send us a draft FERPA protective order for our review. We agreed that once we get that nailed down, Defendants will produce documents and provide the information currently being withheld on FERPA grounds. Please do get your proposed order to us in the next few days so we may get that resolved expeditiously.

With respect to Request for Production 2: we explained we're seeking documents related to the school inviting/allowing students to wear clothing regarding any social or political cause (for example, LGBTQ+ attire for pride month, breast cancer awareness in October, political shirts, etc.) Defendants believe that with that clarification they will be able to do a more targeted search and a date range won't be necessary. We agreed that if the search hit count is still too high, we'll work together to bring it down, perhaps through agreed-upon search terms. Defendants agreed that the clarifications resolved the non-FERPA objections and believe they will be able to do a more targeted search and make a production of any responsive documents.

With respect to Request for Production 4: we explained we're seeking documents related to the School District's decision that "Let's Go Brandon" violates the dress code. In short, we're seeking any documents that informed the School District's decision-making process about banning "Let's Go Brandon" apparel and communications reflecting that process. Defendants agreed that the clarifications resolved the non-FERPA objections and believe they will be able to do a more targeted search and make a production of any responsive documents.

With respect to Request for Production 7: we explained we're seeking documents and communications reflecting Defendants' basis for why they believe they reasonably forecast a material disruption, substantial disorder, or invasion of the rights of others due to "Let's Go Brandon" apparel. We referenced other school speech cases where schools pointed to, for example, prior gang activity around certain symbols or flags as a basis for a restriction. Defendants agreed that the clarifications resolved the non-FERPA objections and believe they will be able to make a production of any responsive documents.

With respect to Interrogatory (to the School District) 6: we explained that we expect a good faith effort from Defendants as to which prior incidents they are relying on to say that bad language "can and does lead to retorts disputes, and substantial disruption of the safe school environment", particularly so we know going into SJ and trial what Defendants are relying upon. Defendants agreed that this clarification resolved the non-FERPA objections and believe they will be able to provide a substantive response.

Please let me know if you think I've misstated or overlooked anything. We have a narrow discovery window and we'd like to get these matters resolved quickly. We anticipate that today's discussion will narrow the universe of documents Defendants need to review and produce. Please do get in touch if any of the searches are returning an inordinately high number of hits. Frankly, we aren't expecting any of our requests to trigger a particularly voluminous response. So we'd much rather work with you so that a production isn't delayed due to y'all having to sift through a bunch of irrelevant chaff.

Finally, here's the [Jingleheimer Junction skit](#).

All the best,

Conor

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